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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN ASHLEY FLINT, Defendant and Appellant.	B205374 (Los Angeles County Super. Ct. No. NA071779)

APPEAL from a judgment of the Superior Court of Los Angeles County Joan Comparet-Cassani, Judge. Affirmed as modified.

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Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec, Joseph P. Lee and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

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An information charged Justin Ashley Flint with murder (Pen. Code, § 187; count 1)[1] and attempted robbery (§§ 664/211; count 2). The information alleged the special circumstance that the murder was committed during the commission of the attempted robbery (§ 190.2, subd. (a)(17)) and alleged, as to both counts, that a principal was armed with a firearm (§ 12022, subd. (a)(1)). The jury found the special circumstance allegation not true but convicted Flint of murder and attempted robbery and found true the firearm allegations. The court sentenced him to an aggregate term of 29 years to life.

Flint contends the court erred by admitting recorded statements he made to undercover agents while in a holding cell which he claims were obtained in violation of *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436). He also contends the court erred by prohibiting him from presenting evidence to explain his coarse language and bragging demeanor on jailhouse recordings, erred in admitting his codefendant's statements about killing witnesses as adoptive admissions, and erred in admitting evidence of uncharged criminal acts in violation of the proscription against the admission of propensity evidence. Finally, Flint contends the court erred in refusing to instruct the jury regarding second degree murder and manslaughter. We modify the judgment to correct errors in the abstract of judgment and, as so modified, we affirm.

BACKGROUND

Prosecution Evidence

On March 28, 2006, Genardo Huizar left work and returned to his home on Eucalyptus Avenue in Long Beach just before 6:00 a.m. The weather was cold, rainy, and overcast. As he approached the front door to his house Huizar noticed two young men riding bicycles. The men turned their heads, made eye contact with Huizar, and continued on their way without slowing down. The shorter man was riding a small bicycle and wore a cap on his head. The taller man was riding a 10-speed bicycle and

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1 Further unmarked statutory references are to this Code.

was either bald or had a closely shaven head. Huizar entered his house and minutes later heard gunshots. The gunshots sounded as though they had been fired from a small caliber gun, possibly a .22. Huizar went to sleep but was awakened by his mother at approximately 7:00 a.m. who informed him that there were several people and police outside. Huizar told officers at the scene what he had seen and heard. He described the two young men on bicycles as Hispanic. Several days later he saw in a newspaper a photograph depicting two young men on bicycles outside of a bank that he thought looked like the men and bicycles he had seen the morning of the shooting.

On March 28, 2006, Jose Burgos was delivering newspapers on Eucalyptus Avenue with his coworker at approximately 6:10 a.m. As he drove slowly down the street he saw what he thought was either a mannequin or a person lying across a driveway and sidewalk near a car with its trunk open. He stopped his car and, upon closer view, saw a woman but she had no pulse and was not breathing. He called 911. As he was performing CPR per the operator's instructions, a man stopped and assisted him. Burgos then knocked on the door of the adjoining house, later determined to be the woman's home, and a man exited, followed by Sheriff Deputy Jenny Martin who was crying and "yell[ing]." Paramedics arrived and transported the woman to the hospital.

The woman lying on the ground, Deputy Sheriff Maria Cecilia Rosa, had sustained two bullet wounds from a .22 caliber weapon and was dead on arrival at the hospital. One bullet entered her shoulder bone and lodged in a muscle. The second bullet entered her abdomen, lacerated her colon, pierced the aorta artery and inferior vena cava blood vessel, causing massive internal bleeding and death.

According to Martin, a fellow sheriff deputy sharing the home, Rosa worked the 6:00 a.m. shift at the inmate reception center and was apparently getting ready to go to work when she was assailed.

Strewn across the interior of Rosa's car trunk, officers found Rosa's purse, her wallet, her badge, and her unlatched holster. Officers also recovered a nine-millimeter, semi automatic Hechler and Koch handgun from the trunk. There were six rounds in the magazine and two bullets jammed in the weapon. One bullet had "stove piped" out of the

ejection port and another round was jammed partially into the chamber underneath the "stove piped" round. Officers opined that the bullets jammed in this fashion either because Rosa had not pulled the slide all the way back to expel the already chambered round or because she forgot that a bullet was already chambered and attempted to chamber a round and did not, or was unable to, pull the slide all the way back to eject the first round. Lint in the gun barrel indicated that it had not been fired recently. Rosa's nine millimeter Beretta duty weapon was in the front passenger compartment. Police, using metal detectors, found no shell casings at the scene and concluded that the gun used in the shooting was likely a revolver which is designed to retain shell casings.

Police recovered a small bicycle from in front of a house a short distance away from the scene of the murder. DNA recovered from one of the bicycle's handle grips was a "cold hit" to Frank Gonzalez. A DNA sample Frank Gonzalez later provided while in custody proved to be a match to the DNA taken from the bicycle.

In an effort to find the assailants, officers collected video surveillance recordings from bus lines and businesses in the area of the murder. Video tapes from a Bank of America located near the scene of the murder, recorded between the hours of 4:00 and 7:00 a.m. on March 28, 2006, yielded three photos of two young men riding bicycles. Flyers containing one of these photos, a photograph of the bicycle left near the scene, and Huizar's description of the two bicyclists he saw on the morning of the murder, were widely posted throughout the neighborhood, at residences, inside businesses, as well as over the telephone in the lock up in Long Beach's central jail.

Undercover Operation and Secretly Recorded Conversations

The record does not disclose when, or the circumstances under which, Flint became a suspect in Rosa's murder. In any case, sometime in mid-August 2006, officers transferred Flint from Delano State Prison in North Kern County, where he was serving a sentence on an unrelated robbery conviction, to the Los Angeles County jail, ostensibly to participate in a lineup. The Los Angeles Sheriff's Department arranged for Flint to be placed in a holding cell where undercover officers were placed in his cell posing as fellow inmates. The conversations with the undercover officers were secretly audio and

video taped (hereafter video recordings). As part of the undercover operation, Flint was later placed in a holding cell with Frank Gonzalez who was also a target in the investigation. Video recordings were also obtained of their conversations. Undercover officers were rotated in and out of the holding cell, ostensibly to go through the booking process, with as few as one and as many as six officers in the cell with Flint at any given time. Overall, 17 sheriff deputies and Long Beach police officers participated in the undercover operation.

Segments of conversations, from the many hours of video recordings, were played for the jury at trial. In one segment, after Gonzalez walked past the holding cell accompanied by deputies, Flint said, "[s]omeone had to say something cause fuckin' just out of the blue they're gonna fuckin' call both of us [for the lineup]." The undercover officers then asked whether he told anyone about the shooting, whether there were witnesses, or whether Flint or Gonzalez had perhaps left evidence at the scene. Flint said neither he nor Gonzalez had left anything, not even shell casings, because the gun was a revolver. Flint said that they both rode bicycles and that after the shooting he rode the bicycle "[f]ar away. I rode that motherfucker like five blocks and just left that shit in the alley. But it had those foam handles so it wouldn't ever leave fingerprints."

The officers directed the conversation to the crime itself and asked if they had beat up an old lady, or raped a young girl, or committed some other heinous crime. Flint said that it was "just a straight robbery" but that they did not get any money or property. One of the officers asked, "why did he shoot the person then?" Flint replied because, "[t]he bitch pulled out a gun." He said that her gun "was a bigger caliber than the one we had" and "[s]he pulled out a big old . . . Woop."

The officers asked about the revolver Gonzalez used and Flint replied, "[o]h, that shit's gone. That motherfucker's in the ocean." The officers asked whether the revolver was a .38 caliber handgun and Flint said that it "was just a little pussy ass fuckin' .25 or .22 or some shit."

To move the conversation along the undercover officers arranged for Flint to be brought out of the cell and informed by officers of the charges against him. When Flint

returned to the cell, he told the undercover officers that he had been charged with "[f]uckin' murder." He said that he told the officer who informed him of the charges "'I don't even like guns. How did I get murder?' He's like, 'I dunno.' Man. Murder of a fuckin' cop. These people are really gonna like that shit. Oh, let me see your paperwork. Oh, you killed fuckin', our friend?" One of the undercover officers asked Flint, "A deputy?" Flint responded, "[y]eah. The bitch used to work here."

The undercover officers suggested that Flint tell his story to the investigating officers before Gonzalez tried to blame him for the shooting. Flint said "[y]eah, but fuckin', I don't wanna go fuckin' talkin' right before this lineup and have them not even point me out." Flint asked "they gotta have a lot of fuckin' evidence to convict you of a murder. Don't they?" He acknowledged there "was a picture" captured by a Bank of America video surveillance camera but that "it didn't show nothing."

Officers then placed Flint in a cell with Gonzalez. Video recordings of portions of their conversations were also played for the jury at trial. In one segment, Gonzalez told Flint, "So I guess we're arm in arm. We're crimies now. Can't say nothing to nobody. Nothing. Don't even explain your case to nobody. Nothing. Don't break on me either." Flint asked, "They ain't got no fuckin' evidence, right?" In response, Gonzalez said, "No, they ain't got nothing. What they got? All they got is a bike. That's my bike. Everything's gone, everything's gone, everything's thrown in the trash. They come and talk to you, just say, talk to my lawyer. That's it. I got nothing to tell you guys. Plain and simple. Did they say what court?" Flint responded, "Nah. We got Long Beach court. You know that."

In another conversation, Flint and Gonzalez discussed possible alibis and the evidence against them. Gonzalez told Flint, "I told you I got that bitch. Didn't I get her. I got her. Let's not even talk about it no more." Both men laughed. Later Flint said, "[w]hy couldn't the bitch just give up the goddamn wallet."

Flint assumed that because they were told there was going to be a lineup that "[s]omeone seen something." Gonzalez later said that they would find out who the witnesses were and "hit them" "[f]ull force." Flint replied that "if they disappear it looks

bad on us." He later referred to any witnesses that talked to police as "[f]uckin' snitches."

At one point, an undercover officer joined Flint and Gonzalez in the cell and Flint discussed being charged with the murder of a deputy sheriff. Flint described an incident that he said sounded like deputies beating an inmate that had been accused of killing a police officer. The undercover officer said, "[s]o you know what's gonna happen if they come take me . . . ." Flint said that he would fight back because "Fuck it. What's another count?" Later Flint sang the title line of the Bob Marley song, "I [S]hot the [S]heriff."

Flint's Recorded Statements to the Police

On September 11, 2006, Flint waived his *Miranda* rights and agreed to be interviewed by Long Beach police detectives. The recorded portion of his interview was played for the jury at trial. Early in the morning on the day Rosa was shot, he ran into Gonzalez, who was carrying a pair of bolt cutters. Gonzalez asked him whether he wanted to "come up," meaning did he want to try to steal some money or property. He agreed and they proceeded to burglarize two garages and brought the stolen property back to Flint's home. While there, Gonzalez took a handgun from his waistband and placed it in a box of the recently stolen clothing. Referring to the handgun, Gonzalez said "we might need this," and put the handgun back in his waistband. They went outside and threw the bolt cutters behind a dumpster in an alley. Later, they rode around on bicycles that they found in a backyard, trying to decide what to do to get money. Their route included riding around a Bank of America. During the ride Gonzalez told him, "I'm going to jack some bitch's purse," which he took to mean that Gonzalez intended to steal someone's purse.

On Eucalyptus Avenue they saw a woman (Rosa) standing near the trunk of her car. Gonzalez rode toward her and jumped off his bike as he approached her. Flint stopped his bike nearby and heard the woman say "hold on, hold on" or "'hold up, hold up.'" Gonzalez turned, took a few steps, and, as he turned back, pulled the gun from his waistband, and fired two or three rounds at the woman. The woman was holding a large

caliber gun but he did not believe that she had fired it because he did not see a muzzle flash. Gonzalez tossed the gun to him and he rode off on his bicycle while Gonzalez took off on foot. A few blocks away in an alley, he dropped the bicycle and the hooded sweatshirt that he was wearing. He quickly checked his body for bullet wounds, concluded that he had none, and walked off. A block or so away he saw Gonzalez and returned the gun to him.

In the days before the shooting he had been using methamphetamine and had not slept for three days. After the shooting, he went home, ate something, and went to sleep.

The only people he told about the shooting were his friends, Eddie and Terry Zogg. He told them that he and Gonzalez were trying to "come up" and that "[Gonzalez] ended up shooting somebody." He saw a flyer at these friends' home and learned that the woman was a deputy sheriff. This was not the first time that he had seen Gonzalez with a gun. He "never had a gun" and "didn't want no part of having a gun around [him]." In an unrecorded part of his statement, Flint told the officers that Gonzalez had wanted him there in case the victim put up a fight.

Witness Eddie Zogg

Eddie Zogg testified as a prosecution witness. He had met Flint through their mutual friend Eric O'Brien. He believed that Flint was a regular user of methamphetamine. A day or so after the shooting Flint came to his home at approximately 1:00 a.m. and asked if he could spend the night "because he was running from the cops . . . ." Zogg told Flint that it was too late and refused to let him stay. Flint "said something about robbing that bitch and hearing a gun shot and running." Flint seemed to be bragging about the robbery and shooting. Zogg later saw a flyer about the shooting of a woman sheriff deputy and believed that it was the same incident described by Flint. When interviewed by police, Zogg reported that Flint had said that there was a struggle and then she got shot.

Flint's Testimony

Flint testified on his own behalf. At the time of the shooting he was 19 years old, a drug addict, had been using methamphetamine, and had gone without sleep for three

days. When using methamphetamine he was usually "jumpy, giggly [and] smiley." A few weeks after the shooting he was convicted of robbery at a Ralphs market and sent to prison for two years. He referred to the robbery as "a beer run" "gone wrong."

Before the shooting, he and Gonzalez had burglarized some garages and brought the loot home. At his home when Gonzalez showed him the gun he told Gonzalez to leave it but Gonzalez refused, saying, "might need this," that he had enemies, and Flint responded, "whatever."

After they stole the bicycles, he suggested going to North Long Beach where he knew there was a rifle that he could trade for drugs. Gonzalez said he wanted to steal a purse. He did not really pay attention because he wanted to go home and sleep. While riding in the direction of home they encountered a woman near the trunk of her car (Rosa). Gonzalez dropped his bicycle, approached her, and said something to her. When he turned his bicycle around and looked back at them he heard the woman say, "hold up, hold up" while pointing a gun at Gonzalez using a two handed grip. When Gonzalez saw the woman's gun he took a few steps, drew his handgun, turned, and fired two or three shots at her.

Gonzalez gave him the gun and ran off. He rode to an alley where he dropped the bicycle, discarded his sweatshirt, and checked his body for bullet wounds. Heading home he saw Gonzalez, returned the gun to him, and asked "[w]hat the hell was that about?" He was very tired and went home, ate a bowl of cereal, and went to bed.

A few days later, at Eddie Zogg's home, he told his friends "[w]e were trying to come up and [Gonzalez] shot somebody." He saw a flyer about the murder in his friends' bedroom and told them, "this is it right here."

In justifying his coarse language on the video recordings played to the jury, Flint said that inmates routinely used coarse language, and that he personally used the term "bitch" all the time. When talking to fellow inmates he acted tough, bold, and exaggerated, because, unlike most inmates, he was Caucasian and young, and afraid of being considered a "punk."

Regarding his singing "I Shot the Sheriff," he explained he had heard that if you kill a police officer, you get beat up in custody by deputies. Because he too was accused of killing a law enforcement officer, he sang the song to convey its message of self defense, meaning that he would defend himself against a beating by deputies.

When describing the rifle that he told Gonzalez they could trade for drugs, he said that he was not very familiar with guns and that he "really [didn't] like them."

Cross-Examination of Flint

To impeach Flint's characterization of the Ralphs market robbery as a "beer run" "gone wrong," his testimony denying that he had bragged about Rosa's shooting, and his testimony that his coarse and tough language was not typical but responsive to the coercive environment in the cell he shared with the undercover officers, the prosecutor played audiotape recordings of Flint's jail telephone calls in which he bragged about the robbery and used profanity. As he described the robbery to his friend Terry O'Brien, "I walked out with some beer and some fool ran up and cracked me in the back of my head with his fist and I beat the fuck out of him, stomped his head to the ground." Flint next called his mother. Referring to the robbery, he told her "I cracked that fool, knocked his tooth out. Remember? You came when I ran up, I kicked that fool in his face, he went down. I just started stompin' the fuck out of him."

To impeach Flint's testimony that he did not like guns, the prosecutor was permitted to play a segment of a video recording in which Flint is heard discussing a freeway shooting and saying that he wished he "would have shot that fool."

Witness Eric O'Brien

Eric O'Brien testified for the defense. He was at the Zoggs' home when Flint came over and told them about the shooting. Flint told them that he was with Gonzalez when Gonzalez tried to rob someone. He heard shots and took off. He said he was scared. When he saw a flyer about the shooting of a deputy sheriff he told O'Brien that he had been involved in the shooting.

Rebuttal

Mark Mendoza, a manager at Ralphs market, testified on rebuttal. On April 16, 2006, at approximately 4:00 p.m., he was paged to the front of the store because Flint and Eric O'Brien had taken beer from the store without paying for it. He observed Flint in an altercation with a Ralphs employee who was attempting to write down Flint's car's license plate number. When Flint saw Mendoza also writing down his license plate number Flint swung at Mendoza but Mendoza was able to block his punch. Flint tried to punch Mendoza again and Mendoza hit back without apparent effect. Flint again punched him, he fell to the ground, Flint kicked him in the head, and Mendoza blacked out.

DISCUSSION

Miranda

Flint acknowledges that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." (*Illinois v. Perkins* (1990) 496 U.S. 292, 296 [110 S.Ct. 2394, 110 L.Ed.2d 243] [undercover officer posing as a fellow inmate need not provide *Miranda* warnings before asking questions likely to elicit an incriminating response].) This is because "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." (*Ibid*.; see also *People v. Williams* (1988) 44 Cal.3d 1127, 1142 ["When a defendant talks to a fellow inmate, the coercive atmosphere of custodial police interrogation is absent"].)

He contends, however, that the undercover officers' interrogation while in the holding cell created a coercive atmosphere for him and, because coercion is determined from the perspective of the suspect, *Miranda* warnings were required. (See, e.g., *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct.1682, 64 L.Ed.2d 247].) He contends that being "hounded relentlessly" by 17 undercover officers compelled him to present an "exaggerated view of his own street-toughness as a defense mechanism" and made him act "'tough,'" use profane language, and behave in an unnatural manner. He further contends that while in the cell he was led to believe that someone who had been accused

of shooting an officer had been beaten by deputies. The fear for his safety created by police was so coercive that the admission into evidence of his jailhouse recorded statements violated *Miranda*. We disagree.

The officers did not violate his *Miranda* rights because "*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates." (*Illinois v. Perkins*, *supra*, 496 U.S. at p. 298.) Flint has not suggested, nor does the record support, that the officers posing as inmates used physical force or threats to make him talk. His claim that the atmosphere of his confinement was coercive although undoubtedly true, would be just as true whether the inmates are imposters or real criminals. In any case, the record shows that he spoke in the same boastful, profane manner when speaking with friends, and even when speaking with his mother, about his criminal activities.

In a related argument, Flint acknowledges that statements obtained through police subterfuges do not make the statements inadmissible, but contends that the police subterfuge violated his right to due process because the coercive atmosphere caused him to behave with exaggerated bravado which made his statements on the video recordings unreliable. We disagree.

Due process is not offended unless the subterfuge or "trickery" the officers used is of the type likely to produce false statements. (See *People v. Hogan* (1982) 31 Cal.3d 815, 841 ["The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined'"]; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280 ["Police trickery that occurs in the process of a criminal interrogation does not, by itself, render a confession involuntary and violate the state or federal due process clause"].) Here, there is nothing to show that his statements were unreliable because of the police subterfuge. His description of the shooting remained consistent whether he was speaking in the jail cell with the undercover officers, to the detectives in his recorded statement, or at trial. Likewise, there is no reason to believe that Flint acted any differently, or used language

that he normally did not use, simply because he was in a jail cell with persons he believed were fellow inmates but were in fact undercover officers.

Limitation on Eliciting Evidence

Flint contends the court wrongly prevented him from eliciting testimony to explain why he was fearful of a beating by deputy sheriffs while in jail and from fully explaining that he sang the song "I Shot the Sheriff" to show that he would defend himself against such a beating. Again, we disagree.

In one of the video recordings, Flint tells his fellow inmate, an undercover officer, about what sounded to him like officers beating an inmate allegedly accused of killing a police officer. In this conversation, he did not say that it occurred while in jail on this occasion or when the incident occurred. When testifying, however, he said that the incident he was referring to occurred on a previous jailing. On cross-examination of one of the undercover officers, defense counsel asked the officer if he knew of any beatings that had been staged to intimidate Flint. The prosecutor objected and the court sustained the objection. Flint contends the court erred by sustaining the prosecutor's objection.

The court's ruling was correct. Flint's only claim of relevance is that the staged beating supports Flint's state of mind that he was afraid of being beaten. To support this state of mind, he would have had to be aware of the beating. But he made no such factual claim at trial. Indeed, he testified that the beating he was referring to that caused his fear occurred on another occasion. Thus, whether the police staged a beating that Flint was not aware of was not relevant to any issue in the case.

To support his claim that he sang words from the song "I Shot the Sheriff" as a declaration of his intent to defend himself against a beating by deputies, Flint wanted to testify that the song's message was about self-defense. He contends the court erred by preventing him from presenting this explanation.

We see no error. The court permitted Flint to explain what the song "I Shot the Sheriff" meant to him. On direct examination Flint testified, "if you've ever listened to the song, it's talking about self-defense. It was just talking about, I'm going to get my ass beat when the cops come in. And I'm telling the dude with me and Frank [Gonzalez],

no, fuck that, I'm going to stand up for mine, and I'm going to fight back." When he said something to the effect that "Bob Marley had it right," Flint testified that he meant "[s]tand up, . . . like, defend yourself."

Statements About Eliminating Witnesses

In certain video recording segments, Flint said that because he and Gonzalez had been brought together for a lineup someone must have talked to the police. In one such segment Gonzalez responded, "We're gonna find out. Before they hit that stand we hit them. Full force." Flint replied, "[f]irst thing we're gonna do is we're gonna go to court and waive time."

In another segment, Flint and Gonzalez again discussed possible witnesses:

"[Flint]: Yeah. Hey, if we weren't in jail right now, we wouldn't have been fuckin' busted for the murder. But I wonder how the fuck. . . man.

"[Gonzalez]: We'll find out who was talkin' if somebody was talkin'.

"[Flint]: Yeah, if they disappear it looks bad on us.

"[Gonzalez]: Huh?

"[Flint]: And if they disappear it looks bad on us.

"[Gonzalez]: Who disappear?

"[Flint]: Fuckin' snitches."

Flint contends the court erred by admitting these statements as adoptive admissions[2] because there was nothing to show that he adopted Gonzalez's statements, but if there was, his reactions to the statements were irrelevant, the evidence should have been excluded under Evidence Code section 352 as cumulative and more prejudicial than probative, and its admission violated his Sixth Amendment right of confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 [134 S.Ct. 1354, 158 L.Ed.2d 177]. Flint's claims lack merit.

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2 Evidence Code section 1221 provides that "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

Although we agree that Flint's reactions to the statements were ambiguous, because one reasonable interpretation of the conversations supported a guilty state of mind, they were admissible and it was up to the jury to decide whether or not to accept the guilty interpretation. (See *People v. Silva* (1988) 45 Cal.3d 604, 623-624 [possible implied adoption through silence was sufficiently relevant to be submitted to the jury under appropriate instructions]; *People v. Castille* (2005) 129 Cal.App.4th 863, 881 [jury is uniquely qualified to determine whether an ambiguous response qualifies as an adoptive admission].) Here, Flint did not remain silent or affirmatively distance himself from Gonzalez's comments about eliminating witnesses. Flint's response that the "[f]irst thing we're gonna do is we're gonna go to court and waive time" could reasonably be interpreted to mean that he fully endorsed Gonzalez's suggestion to "hit them" first and that in order to discover and eliminate witnesses against them they should delay the start of the trial to give them time to do so. His comment to Gonzalez that "if they disappear it looks bad on us," reasonably suggests that he was considering eliminating any witnesses but was concerned about the repercussions.

Flint contends that because he had admitted "some knowledge of, and involvement in, the charged offense," the conversations were irrelevant or, if relevant, so minimally probative that they should have been excluded under Evidence Code section 352. Again, we disagree. Presence at the scene of a crime alone, which is all he admitted to, is not a criminal offense. (*In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [mere presence at the scene and failure to prevent a crime do not establish aiding and abetting of that crime].) His responses and comments to Gonzalez were relevant to show that he was more than just present at the scene. And, of course, because they were relevant to guilt, they could not be cumulative to evidence that was not sufficient to establish guilt, his presence at the scene of the murder. Nor did the court abuse its discretion in failing to exclude the evidence under Evidence Code section 352 as more prejudicial than probative.[3] The

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3 Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue

evidence was highly probative to show that Flint's involvement in the murder of Rosa was more than his mere presence at the scene. Although his comments about "fucking snitches" and about making witnesses "disappear" tended to show him as a callous and violent man, the court nonetheless properly determined that the evidence was more probative than prejudicial. Under Evidence Code section 352 "prejudice" is not synonymous with "damaging." (*People v. Daniels* (2009) 176 Cal.App.4th 304, 317.)

Further, *Crawford* did not bar admission of the evidence because the statements were not testimonial. Flint and Gonzalez spoke to each other as friends. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 51 ["An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"].) Neither expected that the conversation would be used at trial. Indeed, if they had so thought, they surely would have kept quiet. (*Id*. at p. 52 [testimonial statements are those which would "'lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"]; see also *People v. Jefferson* (2008) 158 Cal.App.4th 830, 842-844 [codefendants' recorded conversation while in a jail cell was not testimonial and was properly admitted at trial].)

Evidence of Uncharged Acts For Impeachment

Flint contends the court erred by admitting the details of his robbery at Ralphs market, and by admitting the statement he made in connection with an alleged freeway shooting that he wished he "would have shot that fool." He contends this evidence of uncharged criminal acts lacked impeachment value and constituted inadmissible character evidence and should have been barred under Evidence Code section 352. We disagree.

Character evidence is inadmissible to prove a person's conduct on a specific occasion but is admissible when relevant to a witness's credibility. Thus, Evidence Code section 1101, subdivision (a) provides that "[e]xcept as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or

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consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (c), however, specifies that "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." Evidence Code section 786 provides that "[e]vidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness." Evidence Code section 352, however, may limit the admission of otherwise relevant evidence.

Although the evidence of the robbery may have shown Flint's bad character, it was nonetheless relevant noncharacter evidence to impeach Flint's direct testimony and the court did not err in failing to exclude it under Evidence Code section 352. The robbery and his descriptions of it to his friend and mother were probative to directly challenge the truth of certain statements made by Flint in his direct testimony.

Flint's description of the Ralphs market robbery in his direct testimony minimized its seriousness by his characterization of it as a "beer bust gone bad." Evidence of the details of the robbery admitted by the court contradicted this characterization by showing that the robbery involved a theft of large quantities of beer and a violent confrontation with a Ralphs market manager. Similarly, Flint's description of the robbery in his telephone calls from jail directly contradicted his testimony that when incarcerated he felt compelled to use profanity and coarse language so that his fellow inmates would not consider him a "punk." The evidence of his telephone calls after the robbery boastfully describing how he punched Mendoza and kicked him in the head also directly contradicted his testimony that he did not brag about committing crimes. Evidence of his discussion of the freeway shooting stating that he wished he "would have shot that fool" similarly contradicted his testimony that he did not like guns.

Instructions on Second Degree Murder and Manslaughter

Flint requested instructions on second degree murder and manslaughter based on the theory that Rosa was killed in the course of an attempted "purse snatch," or grand theft without use of force or fear. (§ 487, subd. (c) [grand theft is committed when

property is "taken from the person of another"].) The court refused the instructions on the ground no substantial evidence would support a jury finding that the underlying crime was anything less than an attempted robbery with use of force. Flint contends the court had a sua sponte duty to instruct on these lesser included offenses. We disagree.

"A trial court has a sua sponte duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the charged offense are present, but not if there is no evidence that the offense was less than charged. [Citations.]" (*People v. Wilson* (2008) 43 Cal.4th 1, 16.)

Flint was prosecuted on a felony murder theory, namely that the murder was committed during the course of an attempted robbery. Under the felony-murder doctrine, proof of intent to kill is unnecessary. All that is required is that the perpetrator had the specific intent to commit the underlying felony. (*People v. Jones* (2003) 29 Cal.4th 1229, 1256.)[4]

Flint contends that he was entitled to instructions on second degree murder and manslaughter because the jury could have found that Rosa was killed during the nonviolent act of grand theft from the person based on Gonzalez's statement that he wanted to "jack some bitch's purse." Evidence of this single statement, however, was insufficient to warrant instructions on lesser offenses where the evidence also showed that they intended to use a gun if necessary to accomplish the "purse snatch." Based on his own testimony, Flint knew Gonzalez had a gun when they went looking for a purse to "snatch." When Gonzalez picked up the gun from the box of clothes they had stolen and placed it in his waistband, he told Flint "we might need it." Flint testified that he told Gonzalez to leave the gun, but when Gonzalez said that he had enemies, Flint acquiesced by responding, "whatever." Flint further stated that Gonzalez wanted him along in case the victim put up a fight. This evidence demonstrates that even before they encountered

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4 Because proof of intent to kill is unnecessary, "circumstances that may serve to reduce the crime from murder to manslaughter, such as provocation or imperfect self-defense, are not relevant in the case of a felony murder. [Citations.]" (*People v. Robertson* (2004) 34 Cal.4th 156, 165.)

Rosa they contemplated using force—the gun—to accomplish the theft, and physical force—inflicted by Flint—if necessary to subdue the victim. As things turned out violent force was in fact used in the attempted robbery. Thus, all evidence on the point permitted no conclusion other than that the underlying theft offense that Flint and Gonzalez contemplated and carried out involved the use of violent force. No substantial evidence warranted instructions on the lesser included offenses of manslaughter and second degree murder. (*People v. Wilson*, *supra*, 43 Cal.4th at p. 16.)[5]

Correction of Abstract of Judgment

The Attorney General contends, Flint does not claim otherwise, and we agree, that the court should have imposed two, rather than one, $20 court security assessment fee pursuant to section 1465.8, subdivision (a)(1), one for each of his two convictions.[6]

The Attorney General also correctly points out that the abstract of judgment does not accurately reflect that the court imposed of a total term of 29 years to life. The court selected the attempted robbery conviction in count two as the base term, imposed the high term of three years and imposed and stayed the one-year term for the principle armed allegation. Consecutive to this three year term, the court imposed a 25 years-to-life term for the murder conviction in count one, plus a consecutive term of one year for the principal armed allegation. The abstract of judgment, however, does not include the one year enhancement on count one and incorrectly indicates that the sentence imposed for the attempted robbery conviction in count two was stayed.

Flint argues for the first time in his reply brief that the abstract of judgment does not need correction because sentence on the attempted robbery conviction should have

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5 Because we conclude Flint failed to demonstrate error occurred we necessarily further conclude that the cumulative effect of the claimed errors do not require reversal of the judgment.

6 Former section 1465.8, subdivision (a)(1) provides that "[t]o ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on every conviction for a criminal offense . . . ."

been stayed under section 654.[7] (Citing, *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 547-548 [where robbery and murder were committed with a single objective punishment on the lesser offense had to be stayed under section 654]; but see *People v. Osband* (1996) 13 Cal.4th 622, 730-731 [court declined to stay punishment on the lesser offenses pursuant to section 654 because it was a factual question whether the crimes were committed with a single objective].) Flint did not raise the issue in the trial court, nor in his opening brief on appeal, and has forfeited the issue. (*People v. Scott* (1994) 9 Cal.4th 331, 351-356.)

DISPOSITION

The abstract of judgment is corrected to reflect a court security fee of $40 ($20 for each of the two convictions pursuant to section 1465.8, subdivision (a)(1)), a consecutive three-year term imposed for the attempted robbery conviction in count two, and an additional one-year enhancement pursuant to section 12022, subdivision (a)(1) imposed for the murder conviction in count one. As so corrected, the judgment is affirmed. The trial court is directed to prepare a new abstract of judgment reflecting these changes and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J. CHANEY, J.

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[7] Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."